United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

586

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,739

UNITED STATES OF AMERICA

v.

CLIFFORD H. MIDDLETON,

Appellant

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

*Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,139

United States of America

v.

Clifford H. Middleton,

Appellant

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Issues Presented for Review

1. Whether a lapse of 23 months between arrest and trial, during which entire time appellant was incarcerated, during which time witnesses were lost to the defense, and where 16 months of the lapsed time was attributable to the Government, is not sufficient ground for dismissal of the indictment for denial to appellant of a speedy trial.

2. Whether the court below, in refusing to accept appellant's plea of guilty to a lesser included offense, misapplied the standards pertinent to acceptance of guilty pleas.

3. Whether a pretrial single-suspect identification of appellant by the complaining witness, and the circumstances and evidence of that identification, were so unduly prejudicial as fatally to taint the conviction below.

At a preliminary stage, this case was before this Court under the title Clifford Henry Middleton, Appellant, v. United States of America, Kenneth B. Hardy, Director, Department of Corrections, Charles M. Rogers, Superintendent of D. C. Jail, Appellees, No. 20,798.

Referenced to Rulings - Non

Statement of the Case

Appellant appeals from a judgment of conviction entered in the United States District Court for the District of Columbia after trial by jury on the charge of rape, D. C. Code §22-2801, for which appellant was sentenced to imprisonment for ten to 30 years.

The evidence shows that about 9 p.m. on the night of December 19, 1966, the complainant left her home to go to a grocery store about a block away. Tr. 20. On the way to the store, while crossing 18th Street, N. W., between T Street and Florida Avenue, she was accosted by four young men. Tr. 20. They pushed and dragged her into an alley and into the basement of an apartment building, where she was thrown to the floor, stripped of her clothes, beaten, and raped. Tr. 20-21. In the basement there were several people in addition to those who had brought the complainant there, a total of seven or eight people. Tr. 21. The complainant testified that two people had sexual intercourse with her, and that she could identify one of them. Tr. 21.

The night on which the offense was committed was cold and dark (Tr. 37-38), the street on which complainant was accosted is "a fairly dark street at night," and she testified that there were no lights in the alley and none in the apartment basement at the time she was taken there. Tr. 42, 47. The complainant testified that her ability to recognize one of those who had sexual relations with her stemmed from the fact that at intervals, while she was being beaten and raped, a light (a single bare light bulb) was momentarily turned on (Tr. 22, 43, 47-48, 50, 52). She testified that the light was flashed on for less than a minute each time, "maybe a half minute", "a few seconds". Tr. 51.

Following the raping, all of complainant's assailants suddenly left the room, and after a time complainant, still naked, groped her way out of the room in the dark. Tr. 24, 54. Complainant first encountered a woman who covered her with a coat. The police then arrived and wrapped complainant in a police blanket. Tr. 24, 55, 72.

The arrival of the police was coincidental. They were responding to a call for breaking glass in the rear of 1918 -

18th Street, N. W. Tr. 70-71, 75. One of the police vehicles responding to this call was a patrol wagon (Tr. 74-75). Officer Elsts, who drove the patrol wagon, testified that as the wagon came into the immediate vicinity of 18th Street and Florida Avenue, the appellant "came running out of the alleyway on Florida Avenue and seemed like he was pulling up his trousers." Tr. 76. Elsts gave chase, first in the patrol wagon and then on foot, and caught appellant in the 1800 block of Florida Avenue. Tr. 76. Appellant's trousers zipper was open at the time. Tr. 77. After arresting appellant, Officer Elsts placed him in the rear of the patrol wagon and drove to the front of 1918 -18th Street. Tr. 78.

Officer Pickeral, who had responded to the broken-glass call by scout car (Tr. 70-71) and who had wrapped complainant in a police blanket (Tr. 72, 78), then seated complainant in the front seat of the patrol wagon. Tr. 72, 78-79.

Officer Elsts inquired of one of the other officers as to what had happened, and was told that a woman had been sexually assaulted. Tr. 82. He then told the complainant

that he had someone in the back of the patrol wagon, and asked her to turn around to see if she could identify him. Tr. 56, 82. She did so. On direct examination she testified that she recognized the man in the rear of the patrol wagon as "The person who had sexual relationship with me in the basement." Tr. 25. On cross-examination the complainant testified that she had told the officer (Lists) that the man in the rear of the patrol wagon "was one of the men that was in the basement." Tr. 56. Officer Lists testified that complainant told him at the time that the man in the rear of the patrol wagon "was one of the four or six subjects that attacked her." Tr. 83. At the time of this identification, appellant was seated on the right side of the rear of the patrol wagon (Tr. 57, 83) and the complainant was seated on the right side of the front seat. Tr. 56, 81, 84.

Throughout the entire incident the complainant was, understandably, in a highly excited, emotional state. She testified that when she was taken down to the basement by the men who accosted her she "was very frightened" and in fear of her life (Tr. 43), that she was "quite frightened, I don't remember too much" (Tr. 44), that "quite naturally"

her hysteria increased in magnitude from the time she was taken off the street and into the basement. Tr. 44. She testified that during the assault itself she was beaten "to the extent that I was sort of semiconscious at certain times" (Tr. 21), that she was hysterical but tried to keep her senses, but that she was in a state of semiconsciousness part of the time and then went limp and played dead. Tr. 50. She testified that when the men left the basement room she was still somewhat hysterical (Tr. 54) and that when she got out to the street she was hysterical, "crying and screaming" (Tr. 24, 55). Officer Pickeral testified that when he first encountered complainant, still nude, "her eyes were wet from crying; and she was hardly able to talk, she was hysterical." Tr. 72. Sex Squad Detective Chesser testified that when he saw her shortly afterward, complainant "was crying, very excited. * * * She was in what I feel a hysterical state." Tr. 93.

The following day, December 20, 1966, a preliminary hearing was had before Honorable Edward A. Beard, District of Columbia Court of General Sessions. At the time appellant

was clothed in a slate gray shirt and trousers given him by the police department, and a sweater borrowed from another prisoner that day. Tr. 118; Prelim. Hear. Tr. 21-22. 1/

At the preliminary hearing, complainant identified the appellant as her assailant (Tr. 118; Prelim. Hear. Tr. 10-11), but was quite unsure as to the sort of clothing her assailant had worn and as to whether appellant was wearing the same clothing at the preliminary hearing as her assailant had worn. Prelim. Hear. Tr. 18-19. In response to a question by Judge Beard as to whether the sweater appellant was wearing at the preliminary hearing, which Judge Beard described as "a very unusual type sweater", was the same as or different from one worn the previous night, the complainant responded, "In the dark I couldn't see very well." Prelim. Hear. Tr. 19. The clothes worn by appellant on the previous night had been voluntarily turned over by him to the police prior to the preliminary hearing. Tr. 108-110, 113, 117-118. Judge Beard limited the efforts of counsel for appellant to establish, by cross-examination, the extent of complainant's

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1/ References to "Prelim. Hear. Tr." are to the transcript of the preliminary hearing held on December 20, 1966, in the Court of General Sessions.

inability to recognize the clothes worn by appellant. Prelim. Hear. Tr. 15-19.

Because of such limitation, and asserting his right to a full preliminary hearing in accordance with Rule 5, F.R. Cr.P., appellant filed a motion in the nature of a writ of mandamus or, in the alternative, a motion in the nature of a writ of habeas corpus. These motions were denied by the district court, and appellant noted an appeal to this Court (No. 20,758) and moved for summary reversal. On May 22, 1967, this Court (Judges Burger, Wright, and McGowan) denied the motion for summary reversal and affirmed the judgment of the district court.

There followed a series of postponements of the trial date. On June 29, 1967, the trial date was continued to July 24, 1967, at appellant's request. On July 20, 1967, at the request of the Government the case was "decertified" from the Ready Calendar, and on November 2, 1967, it was again decertified, on the oral motion of appellant. The case was again placed on the Ready Calendar on January 17, 1968. On April 18, 1968, the Government's motion for continuance of

the trial date was denied. On the following day, April 19, 1968, on the Government's oral motion, with the consent of appellant, the case was set for trial on a date certain, May 14, 1968.

On that date the case was called for trial before Honorable William B. Jones. Appellant, with the consent of the Government, was permitted to withdraw his plea of not guilty to the charge of rape and enter a plea of guilty to the charge of assault with intent to commit rape. Tr. 3. Appellant was then interviewed by the probation officer and told him that "he was there [at the scene of the crime] but did not actually participate in it." Tr. 4. When appellant appeared for sentencing on July 19, 1968, Judge Jones indicated that, in the light of the probation officer's report, he would not accept the guilty plea. Tr. 4. Accordingly, appellant withdrew his plea of guilty to the lesser charge, and his plea of not guilty to the charge of rape was reinstated.

On September 23, 1968, the case was again placed on the Ready Calendar and set for trial on October 22, 1968, as a definite date. On October 11, 1968, an oral motion by

appellant for a continuance of the trial date was granted, and the trial was set for the first week in November. Finally, on November 6, 1968, the case came to trial before Honorable John J. Sirica.

At the outset of the trial, appellant renewed his effort to plead to the lesser charge (Tr. 3-7), but the court refused to accept the plea because of appellant's position that "he was there but did not actually participate in" the offense. Tr. 4, 6-7.

Appellant then renewed his motion to dismiss the indictment for lack of a speedy trial. Tr. 7. This motion had previously been made before Judge Jones, and had been denied by him. In support of the motion, counsel for appellant showed the length of time that had elapsed since appellant was arrested and indicted; that 11 named individual witnesses for the defense had been located and interviewed, nine of whom were directly involved in the offense with which appellant was charged (Tr. 9); that the passage of time resulted in the defense no longer being able to locate the witnesses, in addition to which they had all "rescinded their

prior statements and refused to testify" (Tr. 9); and that the delay accordingly had substantially prejudiced appellant. Tr. 10. The court denied the motion. Tr. 13.

Argument

I.

The Indictment Should Be Dismissed for Lack of A Speedy Trial.

The Court's attention is respectfully directed to the following pages of the trial transcript: 7, 9-10, 13.

The offense with which appellant is charged was allegedly committed on December 19, 1966. Appellant was arrested that same night and has been in custody ever since. An indictment was promptly retured. Appellant was brought to trial November 6, 1968, twenty-three months later.

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial."

Rule 48(b), F.R.Cr.P., provides that "if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment."

The speedy trial issue was raised by appellant by motion some six months prior to trial and again at trial. Tr. 7. On both occasions appellant's motions were denied. At trial, counsel for appellant showed the prejudice suffered by him as the result of the 23-month wait for trial. Entirely apart from the virulent prejudice to appellant's person resulting from his extended pretrial incarceration (see Smith v. United States, U. S. App. D. C. _____, _____F.2d. _____, No. 22,157, May 7, 1969, slip op., p. 9), there was the serious prejudice to appellant's ability to defend against the charge (ibid) due to the disappearances of named defense witnesses, including eyewitnesses to and participants in the offense with which appellant was charged. Tr. 9, 10, 13. Cf. United States v. Ewell, 383 U.S. 116, 122 (1966).

In Hedgepeth v. United States, 125 U.S. App. D. C. 19, 365 F.2d 952 (1966), this Court considered a 14-month time lapse between indictment and trial, during which time the defendant was incarcerated, to be "a long delay - unusually

long for this District - and requires us to give close scrutiny to the other factors." 125 U.S. App. D.C. at 21, 365 F.2d at 954. In the Smith case, supra, a 13-month pre-trial incarceration was held by this Court to be "long enough to require us to give close scrutiny to the issue" (slip. op., p. 3). Such scrutiny in Smith led the Court there to conclude that there was insufficient "showing of reasonable likelihood of prejudice to the defense." Ibid. But the Court ennunciated this rule. It

> "decided not to rule that prejudice to the person by detention for a year automatically leads to dismissal. A delay of that duration does, however, * * * shift to the prosecution a heavy burden of showing that there was no prejudice to the defense. (Slip. op., p. 5; emphasis supplied.)

How much heavier the burden on the prosecution in the instant case, where the delay was for 23 months, not for a mere year; and where trial counsel set forth in detail, immediately prior to the start of the trial, the names of the disappeared defense witnesses (Tr. 9), something that trial counsel in the Smith case had failed to do. Slip. op., p.4. It was not necessary, as this Court held in Smith (ibid), that

trial counsel show "conclusively that the defense was prejudiced", but we submit that he made "at least * * * a showing of a reasonable likelihood of such prejudice, a showing not negatived by rebuttal of the prosecution." The prosecution, however, did not discharge in the least its "burden of showing that there was no prejudice to the defense." Smith slip op., p. 5.

Under Local Rule 87, it is the duty of the United States Attorney to place a case on the Ready Calendar. Indeed, as this Court said in McNeill v. United States, No. 21,570, decided June 4, 1968, [2/] slip op., p. 2, "the burden is on the Government, not the defense, to bring a case to trial." Even were this not the rule, however, relatively little of the 23 months appellant spent waiting for trial is attributable to him. Continuances totally approximately four months were granted on appellant's motion. One month's continuance sought by the Government was granted with appellant's consent.

2/ Unreported. Discussed and quoted from by Judge Wright in his separate opinion (concurring in part and dissenting in part) in the Smith case, supra, slip. op., p. 8.

Approximately two months' loss of time resulted from the abortive change of plea proceedings. No part of the remaining 16 months can be attributed to appellant. In view of the Government's burden "to bring a case to trial", this 16 months' delay must be attributed to the Government.

Moreover, this Court has held that even delays attributable to a defendant are not to be disregarded. In Hedgepeth v. United States, 124 U.S. App. D. C. 291, 364 F.2d 684 (1966), where ten months of a year's delay was attributable to the defendant, and the remaining two months, attributable to the Government, had been acquiesced in by the defendant, this Court said (364 F.2d at 688):

> "The passing of such a considerable length of time, no matter who is 'at fault', should act as a spur to the Government to seek prompt trial. If the Government is lax in this regard, it is appropriate to take the * * * period [attributable to the defendant] into account in determining whether there has been a denial of the right to a speedy trial."

See also Hedgepeth v. United States, 125 U.S. App. D. C. 19, 365 F.2d 952 (1966); Harling v. United States, ____U.S. App. D. C. _____, 401 F.2d 392 (1968).

In the two Hedgepeth cases and Harling no speedy trial violations were found, but these determinations depended on the facts peculiar to those cases. For example, in Harling the Court

> "fail[ed] to detect even a wisp of prejudice. For most of the period of delay, appellant remained free on bail. Appellant has not made any claim that his defense at trial was in any way impaired by the delay. No proof was lost * * * (401 F.2d at 395-96)

Contrast the position of Mr. Middleton in the instant case. He was incarcerated throughout the period, his defense was seriously impaired and prejudiced by the loss of proof, and his trial counsel claimed such impairment and prejudice in making his motion to dismiss immediately prior to the start of the trial.

In the McNeill case, supra, this Court found a speedy trial violation requiring dismissal of the indictment, even though only six months of the two and a half years between arrest and trial was "unequivocally attributable to the Government." See Smith case, supra, slip. op., p. 8. Again, contrast the instant case where at least 16 of the 23 months between arrest and trial is attributable to the Government.

We recognize that dismissal of the indictment for denial of a speedy trial is a "drastic" remedy that ought not "be invoked lightly or thoughtlessly." See separate opinion of Judge Wright in the Smith case, supra, slip op., p. 11. But in the present case, where the conviction of appellant depends so substantially upon the identification of appellant by a single eyewitness, the complainant, wnere that identification is of questionable value (see Point III, infra), and where the witnesses lost to appellant by reason of the Government's long delay in bringing him to trial included other eyewitnesses to the offense with which appellant was charged, dismissal of the indictment is plainly called for.

II.

The Court Below Erred In Refusing To Accept Appellant's Plea To a Lesser Offense.

The Court's attention is respectfully directed to pages 3-7 of the trial transcript.

Some six months prior to trial appellant sought to change his plea of not guilty to a plea of guilty to the lesser charge of assault to commit rape. The court accepted this change of plea, but, prior to sentencing, after appellant told the probation officer that "he was there [at the scene of the crime] but did not actually participate in it" (Tr. 4), the court indicated that the plea would not be accepted.

Later, immediately prior to trial (before a different judge), appellant again sought to change his plea. Tr. 3-7. Counsel for appellant told the court of the earlier abortive plea change and reported what appellant had told the probation officer. Tr. 4. Counsel also indicated to the court the substance of the Government's case, the complainant's identification of appellant, that appellant had been chased and apprehended in the vicinity of the crime almost immediately after it was committed, and that there were FBI reports of clothing examinations which tended to incriminate appellant (Tr. 4-5), and that appellant had "no affirmative defense other than the fact he didn't do it." Tr. 5. The following colloquy then took place (Tr. 6-7):

"The Court: You heard your lawyer. Now, is what he said correct?

"The Defendant: Yes, sir.

"The Court: What happens if I accept a plea this time and he goes ahead and does the same thing, what assurance do I have he won't do the same thing after this, what assurance do I have? You lied about it once, you lied to the probation officer apparently. Suppose you go back and lie to him again, * * *.

"The Defendant: Your Honor, I didn't lie about what I told the probation officer at all.

"The Court: You didn't lie to him?

"The Defendant: No, I didn't. I told him just like it was.

"The Court: That settles the matter, let's go ahead with the trial. Everything is a matter of record. Call the jury back."

It is clear from the foregoing that the court below both misapprehended what appellant was saying and improperly applied standards pertinent to acceptance of guilty pleas. The court apparently understood appellant's statement to the probation officer that he was present but did not actually

participate in the offense as meaning that appellant was denying guilt. Clearly, he was denying guilt of rape. But his statement to the probation officer was, in the circumstances, not inconsistent with his plea of guilty to the lesser offense of assault with intent to commit rape.

It is true that Rule 11, F.R.Cr.P., provides that "The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." But as this Court has said:

> "While this lodges a discretion in the court, * * * that does not end the inquiry. Appellant's inconsistencies did not afford good ground for refusing the plea. The discretion is to be exercised in relation to the problem as it is presented, which is usually, as it was here, a composite of factors." (Griffin v. United States, ____ U.S. App. D.C.____, 405 F.2d 1378, 1380 (1968).

As was said in McCoy v. United States, 124 U.S. App. D. C. 177, 363 F.2d 305 (1966), "a personal admission of guilt, should not be essential to the acceptance of a plea of guilty under Rule 11. While it would be improper for a court to accept such a plea unless satisfied there was significant

evidence that the accused was involved or implicated in the offense, the court is not required to insist that the accused concede the inevitability or correctness of a verdict of guilty were the case tried." 124 U.S. App. D.C. at 179, 363 F.2d at 308 (Emphasis supplied). Certainly, what counsel for the appellant, with his approval, told the court, and what appellant himself told the probation officer was a significant showing "that the accused was involved or implicated in the offense."

Moreover, as this Court held in Griffin, supra, 405 F.2d at 1380:

> "The plea may be accepted 'even though defendant accompanies his plea with a statement that he is not guilty, on a determination that incriminatory evidence establishes such a high probability of conviction as to satisfy the requirement that there be a "factual basis for the plea" before judgment can be entered thereon.' Bruce v. United States * * * 126 U.S. App. D.C. [338] at 342, 379 F.2d [113] at 119. The present case clearly comes within these standards."

In the circumstances we submit that the court below erred in not permitting appellant to plead to the lesser offense, and that, if the indictment is not dismissed (see Point I, supra), the judgment below should be vacated and appellant permitted to withdraw his plea of not guilty and to plead guilty to assault with intent to commit rape.

III.

The Identification of Appellant Failed To Meet The Standards Established By The Supreme Court and By This Court.

The Court's attention is respectfully directed to the following pages of the trial transcript: 20-22, 24-26, 37-38, 42-44, 47-48, 50-52, 54-57, 70-72, 74-79, 81-84, 93, 108-110, 113, 117-118, 124-126, 128-129, 131-133; and to the following pages of the transcript of the preliminary hearing: 6-11, 15-19, 21-22.

There were three identifications of appellant, all by the complainant: (1) the patrol wagon identification on the night of the crime; (2) the identification at the preliminary hearing

the following afternoon; (3) the in-court identification at trial two years later.

1. The Patrol Wagon Identification

The "totality of surrounding circumstances" (see Simmons v. United States, 390 U.S. 377, 383; Stovall v. Denno, 388 U.S. 293, 302), in the light of which the patrol wagon identification of appellant must be evaluated in order to determine whether it "was so unduly prejudicial as fatally to taint his conviction," are set forth above. It cannot be seriously questioned that this first identification of appellant by complainant, the identification upon which her subsequent identifications necessarily rest, took place in circumstances of a highly suggestive nature and was most unreliable.

In Clemons v. United States, 131 U.S. App. D.C. _____, 408 F.2d 1230 (1968), cert. denied, 394 U.S. 964 this Court quoted approvingly (408 F.2d at 1245, n. 15) ten criteria enumerated by the District Court in the Clark case as relevant in making such an evaluation. See United States v. Clark, 294 F. Supp. 44, 49-50 (D.D.C. 1968). Complainant's patrol

wagon identification of appellant plainly failed six of these ten tests, the other four not being particularly pertinent.

> Test 1. "Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?"3/

Appellant was the only one in the patrol wagon, and therefore "the only individual that could possibly be identified as the guilty party" when Officer Elsts asked complainant to see if she could identify him.

> Test 2. "Where did the confrontation take place?"

In the patrol wagon. A locale more highly suggestive of appellant's guilt is difficult to imagine. Appellant's presence in the locked part of the patrol wagon, tied with Officer Elsts' asking the complainant to see whether she could identify him, must clearly have communicated to complainant that the police believed that appellant was, at the very least, implicated in the rape.

3/ This test and the others quoted infra are all quoted in Clemons, supra, 408 F.2d at 1245, n. 16.

The evidence is, of course, clear that Elsts arrested appellant and locked him in the patrol wagon before Elsts even knew that a rape had taken place. Tr. 75-78, 82. Apparently all he arrested appellant for was "running out of the alleyway *** and seemed like he was pulling up his trousers" (Tr. 76), although it is conceivable that he suspected appellant of glass breaking. In any event there is nothing at all to indicate that complainant was informed, when asked to see whether she could identify appellant, that appellant's presence in the back of the patrol wagon was purely coincidental.

> Test 3. "Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?"

No. The patrol wagon identification took place late at night. There was no reason whatsoever why the identification could not have been postponed until morning, when a lineup could have been held. This is not the Stovall case, supra, where there was fear that the complaining witness might die before a lineup could be held. See 388 U.S. at 295, 302. In this case, the complainant had been badly beaten, but she was ambulatory, had been discharged from the hospital the very night of the crime

(Prelim. Hear. Tr. 7), and was present in court the next morning for the preliminary hearing. Id. 6. In fact, the preliminary hearing was not held until the following afternoon (id. 8-9), so there was more than adequate time in which a line-up could have been held, and no problem about the complainant's ability to attend.

> Test 8. "Was the emotional state of the witness such as to preclude objective identification?"

Yes. The evidence is uncontradicted that complainant was in a highly excited, emotional, hysterical state. Tr. 24, 54-55, 72, 93. While this emotional state of complainant is easily understandable, it did not enhance her reliability or objectivity as a witness, and made her more than normally amenable to the suggestion of appellant's guilt implicit in his presence in the patrol wagon.

> Test 9. "Were any statements made to the witness prior to the identification indicating to him that the police were sure of the suspect's guilt?"

No statements were made indicating that the police were "sure" of appellant's guilt, but all the circumstances certainly suggested to complainant that the police at the least regarded appellant as a prime suspect. Why else was he in the patrol

wagon? ---- Complainant did not know that appellant had been picked up for some other vaguely defined or nonexistent crime.

> Test 10. "Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on less than a positive basis?"

The complainant's observation of the offender was extremely limited, and therefore she was particularly amenable to suggestion. Complainant was accosted on a dark street on a dark night. The alley through which she was taken was unlighted, and the basement in which she was raped was dark, so dark, in fact, that she had difficulty finding her way out. Tr. 37-38, 42, 47, 54. Her ability to recognize her assailants was limited to the "maybe a half minute" or "few seconds" in which a light bulb was momentarily turned on (Tr. 22, 43, 47-48, 50-52), hardly enough time for her eyes to become accustomed to the light. She testified not only to her hysterical condition (Tr. 44, 54), but also that she was in great fear, for her very life (Tr. 43), so frightened that "I don't remember too much." Tr. 44. She testified also that part of the time she

was semiconscious. Tr. 21. At the preliminary hearing she testified that "In the dark I couldn't see very well" (Prelim. Hear. Tr. 19) and was unable to recognize that appellant was wearing different clothes than he had worn the previous night. Prelim. Hear. Tr. 15-19. It appears that at no time did she give the police any description at all of her assailants. Cf. the Clark case, supra, in Clemons, supra, 408 F.2d at 1243; Stewart v. United States, ____U.S. App. D.C. _____, _____F.2d _____, No. 20,983, February 10, 1969, slip op., pp. 2-3; Macklin v. United States, _____U.S. App. D.C. _____, 409 F.2d 174, 175 (1969); Cunningham v. United States, _____U.S. App. D.C. _____, 409 F.2d 168, 169 (1969); Frazier v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____, No. 21,425, March 14, 1969, slip op., p. 14; United States v. Hamilton, _____U.S. App. D. C. _____, _____ F.2d _____, No. 22,361, July 24, 1969, slip op., p. 4.

In the circumstances described, the high degree of suggestion to complainant inherent in the patrol wagon confrontation was unavoidable. As stated in United States v. Wade, 388 U.S. 218,229, "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the

greatest." Even lineups, a fortiori single suspect confrontations, in rape cases "present a particular hazard" because of the "victim's understandable outrage." Wade, supra, 388 U.S. at 230.

The merits of the principle of prompt or "fresh identification" (see Wise v. United States, 127 U.S. App. D.C. 276, 383 F.2d 205, 209-10 (1967), cert. denied, 390 U.S. 964) need not be denied to hold that complainant's patrol wagon identification of appellant, although prompt, was so basically unfair that it could not "tolerably be admitted into evidence." 383 F.2d at 210. This case is a far cry from Wise. There, one complainant encountered the intruder in his house, chased him, caught up with him, and was talking to him when the police arrived, never having lost sight of him during the chase. The intruder was immediately returned to the housebreaking scene, where the other complainant identified him by the sound of his voice. In the instant case there was totally lacking the continuity of action or of contact between complainant and appellant that gave fairness and reliability to the prompt identification in Wise.

The "totality of the circumstances surrounding" the identification here also differ markedly from those in Stewart,

supra, where there was also a prompt identification. There, the complainant had had ample opportunity to observe the accused, gave the police a good description of him, and identified him about two hours after the crime and only minutes after seeing him carrying the loot. Again, in Solomon v. United States, _____U.S. App. D.C. _____, 408 F.2d 1305 (1969), as in Wise, the continuity of action and of the contact between the witness and the accused was unbroken, the Court noting "the fact that [the accused] was constantly in view of either [the witness] or the arresting officer between the commission of the crime and the apprehension [and identification], and the finding of the stolen goods on the path of his flight." 408 F.2d at 1309.

As this Court held in McRae v. United States, _____U.S. App. D.C. _____, _____ F.2d _____, No. 21,980, June 10, 1969, slip op., p. 14:

> "At some point the nexus of time and place between offense and identification must become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses. We conclude that this point was reached, and more, in this case."

In McRae, indeed, the victim had had good opportunity to observe

her attacker and had given a description of him to the police before identifying the accused, which information was sufficient to enable the victim's son to lead the police to the accused.

A fortiori, in this case, where complainant had minimal opportunity to observe her attackers and gave no description at all to the police and where appellant was arrested by an officer who had not even heard that the crime had been committed, there was no nexus whatsoever between offense and identification to outweigh the recognized dangers of presenting suspects singly to witnesses. The totality of the circumstances surrounding the patrol wagon identification were plainly such as to deny appellant due process of law, and the evidence of that identification should not have been admitted.

2. The Identification at the Preliminary Hearing

At the preliminary hearing, the day after the patrol wagon identification, complainant again identified appellant. Prelim. Hear. Tr. 11. Her testimony that she was "sure" he was one of those who had raped her was followed by this colloquy:

> "The Court: How did he happen to fall into the hands of the police? Do you know?
> The Witness: From what I understand, they caught him running from the building.
> The Court: In other words, after they let you go, you complained to the police, and the police went around there and he ran from the building at the time the police went there; is that right?
> The Witness: It seems some other police were in the vicinity and they caught him." (Ibid.)

It goes almost without saying that there was no independent basis for this identification of appellant by complainant. Patently, the preliminary hearing identification depended upon four things:

(a) Complainant's observation of appellant in the patrol wagon the previous night;

(b) Complainant's identification of appellant in the patrol wagon the previous night, and the unlikelihood that she would "go back" on that identification (see United States v. Wade, 388 U.S. 218, 229);

(c) Appellant's presence at the preliminary hearing as "the defendant";

(d) Complainant's having been told that the police caught appellant running from the building.

Counsel for appellant who sought, by cross-examination, to establish the extent of complainant's recognition or non-recognition of appellant met with vague answers (Prelim. Hear. Tr. 15-18) and with frustration by the judge. Prelim. Hear. Tr. 15-18. Counsel did establish, however, that complainant did not know whether appellant was wearing the same clothes at the preliminary hearing as he had worn the previous night. Prelim. Hear. Tr. 18-19, 21-22.

It would appear that all the preliminary hearing accomplished was to give the complainant another opportunity to observe appellant in incriminating circumstances, and thus enable her to be even more "sure" at the trial that he was one of her attackers.

3. Identification at Trial

At trial again, complainant identified appellant. Tr. 25-26. Moreover, at trial, on direct examination as part of the

Government's case, complainant testified to the patrol car identification. Tr. 24-26. Again, it is clear that there was no independent source for the identification at trial -- -- only the prior confrontations in the patrol wagon and at the preliminary hearing.

There was no evidence, let alone "clear and convincing evidence," that the "in-court identification *** had a foundation independent of the [patrol wagon] confrontation." Cf. the Clark case in Clemons, supra, 408 F.2d at 1246, where the improper pretrial identification had been brought into the case not as part of the Government's case but by the defense and where the witness (1) "had observed the unmasked robber under good lighting conditions", (2) "recalled clearly the robber's distinctive physical appearance" and gave the police a pre-identification description of him, (3) picked out the robber's photograph from a display shown to him the night of the robbery, and (4) testified firmly and positively that the in-court identification was not influenced by a prior cellblock confrontation. Such circumstances can not be found in this case.

Contrast also the Frazier case, supra, where the question also was "whether the in-court identifications had a source sufficiently independent of the cellblock exhibition as to be free from its taint." Slip op., p. 14. In holding them not

tainted, this Court noted (ibid.) that both witnesses

> "had excellent opportunities to scrutinize the two robbers. Afterwards, they gave the police detailed joint descriptions of the culprits, one of which depicted appellant reasonably well. In addition, [one witness] selected appellant's photograph out of 'a box of pictures' given him by the police shortly after appellant's arrest."

Such circumstances cannot be found in this case.

Again, contrast the case involving a companion of Frazier, Bryson v. United States, _____U.S. App. D.C. _____, _____ F.2d _____, No. 21,427, June 27, 1969, slip op., p. 7, where the Court also found that an in-court identification had an independent source, because:

> "The robbery occurred in broad daylight and took several minutes, during which she [the witness] stood face-to-face with the robber. Immediately afterwards, the police showed her photographs of five men, not including appellant, and she could identify none of them. Subsequently, a police officer testified that he showed her five more pictures of Negro males, from which she unhesitatingly selected appellant's photo. *** she looked though half a book of photos before spotting appellant, and then later identified his photo in other books."

Such circumstances cannot be found in this case.

Contrast even Sera-Leyva v. United States, _____U. S. App. D. C. _____, 409 F.2d 160 (1969), where the Court found that the witness's identification was "unusually strong, and there was good lighting" (409 F.2d at 163), but hesitated, nevertheless,

> "to initiate a finding of independent source. It happens that we do not have evidence in the record of a detailed description by the identifying witness prior to the confrontation in issue. Compare Clark v. United States, supra 131 U.S. App. D.C. ____, 408 F.2d 1245, where one of the factors establishing independent source for Witness Jones' in-court identification was his recollection of the 'robber's distinctive physical appearance.'"

The Court accordingly "remanded for further inquiry concerning the totality of the circumstances of the confrontation at the *** preliminary hearing," which confrontation, as in the instant case, had been elicited on direct examination of prosecution witnesses at the trial. The instant case, a fortiori, should be reversed. We lack not only what was lacking in Sera-Leyva, a pre-confrontation description by the identifying witness, but also lack the strong identifying elements that were present, albeit insufficient to sustain the conviction, in Sera-Leyva.

It is clear that complainant's in-court identification of appellant had no independent source and depended upon the impermissibly suggestive patrol wagon identification.

4. The Admission of Evidence Regarding the Patrol Wagon Identification Was Not Harmless Error.

There remains the question: Was the denial to appellant of due process of law with respect to the patrol wagon identification harmless error. This question must be answered in the negative.

The test "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" (Fahy v. Connecticut, 375 U.S. 85, 86-87); in other words, whether the Court is "able to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24.

We submit that the Court cannot here find such harmless error. The record is clear that the Government's entire case depended upon complainant's testimony and, specifically, upon her identification of appellant. Complainant was the only eyewitness who testified at the trial.

There was some corroborative evidence, but of a secondary, circumstantial nature. It certainly lacked the strength and convincing quality of complainant's testimony. An agent of the Federal Bureau of Investigation testified, in substance, that

he had found fibers from appellant's trousers on complainant's clothing, and vice versa (Tr. 124-125), and that an FBI serologist had found a stain on appellant's trousers which appeared to be seminal, but that there were no spermatozoa present to positively confirm such a finding. Tr. 128-129, 132. No seminal stains at all were found on any other items of appellant's clothing (Tr. 128-129, 133), including his undershorts. Tr. 131-132.

In this state of the evidence, we submit that complainant's identification testimony did more than merely contribute to appellant's conviction (see Fahy, supra), and the constitutional error was not harmless even by a less stringent test than that imposed by Chapman.

Conclusion

For the foregoing reasons, the judgment of conviction should be reversed.

Because appellant was denied a speedy trial, the judgment of reversal should direct dismissal of the indictment.

If dismissal of the indictment is not directed, the judgment below should be vacated with direction that appellant be permitted to withdraw his plea of not guilty and to plead guilty to assault with intent to commit rape.

If such relief cannot be given appellant, at the very least the judgment below should be reversed and the case remanded.

Respectfully submitted,

Abraham J. Harris
800 17th Street, N. W.
Washington, D. C. 20006
Attorney for Appellant
Appointed by this Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,739

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 22 1970

Nathan J Paulson
CLERK

UNITED STATES OF AMERICA,

Appellee,

Vs.

CLIFFORD H. MIDDLETON,

Appellant.

PETITION FOR A RE-HEARING and suggestion for rehearing EN-BANC.

Middleton H. Clifford
Appellant,
Box 25,
Lorton, Virginia

Fibers of his clothing on hers.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee	vs.	No. 22, 739
CLIFFORD H. MIDDLETON, Appellant.		

APPELLANT'S MOTION FOR A RE-HEARING EN-BANC FROM THE ORDER OF THIS COURT AFFIRMING THE APPELLANT'S CONVICTION

Come now Clifford H. Middleton, the appellant in the above cause, who moves the Court pursuant to rule 35; Federal Rules of Appellate Procedure for an allowance of a re-hearing en-banc from the order of this court entered December 28, 1969, affirming appellant's conviction from the court below for the offense of Rape, a violation of title 22:D.C. Code Section 2801.

Clifford H. Middleton

CLIFFORD H. MIDDLETON
PETITIONER
BOX 25,
LORTON, VIRGINIA

QUESTIONS PRESENTED:

1. Whether a lapse of 23 months between arrest and trial, during which entire time appellant was incarcerated, during which time witnesses were lost to the defense, and where 16 months of the lapsed time was attributable to the Government, is not sufficient ground for dismissal of the indictment for denial to appellant of a speedy trial.

2. Whether a pretrial single-suspect identification of the appellant by the complaining witness, and the circumstances and the evidence of that identification, were so unduly prejudicial as fatally to taint the conviction below. At a preliminary stage, this case was before this Court under the title Cliffod Henry Middleton, Appellant, v. United States, Kenneth B. Hardy, Director, Department of Corrections, Charles M. Rogers, Superintendent of the District of Columbia Jail. Appellees, No. 20,798.

STATEMENT OF THE CASE

Appellant appeals from a judgment of conviction entered in the United States District Court for the District of Columbia after trial by jury on the charge of rape, D.C. Code Section 2801, for which appellant was sentenced to imprisionment for ten (10) to thirty (30) years.

The evidence shows that about 9 p.m. on the night of December 19, 1966, the complainant left her home to go to a grocery store about a block away. Tr. 20. On the way to the store, while crossing 18th Street, N.W. between 'I' Street and Florida Avenue, she was accosted by four young men. (Tr.20) They pushed and dragged her into an alley and into the basement of an apartment building, where she wa s thrown to the floor, stripped of her clothes, beaten, and raped. (Tr.20-21). In the basement there were several people in addition to those who had brought the complaninant there, a total of seven or eight people. (Tr.21). The complainant testified that two people had sexual intercourse with her, and that she could identify one of them. (Tr.21).

The night on which the offense was committed was cold and dark (Tr.37-38), the street on which complainant was accosted is a fairly dark street at night, " and she testified that there were no lights in the alley and none in the apartment basement at the time she was taken there. (Tr.42). The complainant testified that her ability to recognize one of those who had sexual relations with her stemmed from the fact that at intervals, while she was being beaten

and raped, a light (a single bare light bulb) was momentarily turned on (Tr.22,43,47-48, 50,52). She testified that the light was flashed on for less than a minute each time, " maybe a half a minute", " a few seconds". (Tr.51). And; following the raping all of the assailants suddenly left the room, and after a time complainant still naked, groped her wayout of the room in the dark of the night. (Tr. 24,54). The police then arrived and wrapped complainant in a police blanket (Tr.24, 55, 72). This arrival was coincidental. They were responding to a call for breaking glass in the rear of 1918 - 18th Street, N.W. (Tr.70-71). Some time prior to this the appellant had came running out of the alley-way on Florida Avenue when he was arrested by Officer Elsts. He was placed into the patrol wagon and drove to the front of 1918 18th Street. (Tr.78).

Officer Elsts inquired of one of the other officers as to what had happened, and was told that a woman had been sexually assaulted. He then told the complainant that he had someone in the back of the patrol wagon, and asked her to turn around to see if she could identify him. (Tr.56,82). She did so. On direct examination she testified that she recognized the man in the rear of the patrol wagon as " The person who had sexual relationship with her in the basement ." Tr. 25.

At the time of this identification, appellant wa s seated on the right side of the rear of the patrol wagon (Tr.57,83) and the com - plainant was seated on the right side of the front seat. Throughout the entire incident the complainant was, understandably, in a highly

excited, emotional state. She testified that when she was taken down to the basement by the men who accosted her she " was very frightened" and in fear of her life (Tr.43), that she was " quite frightened, I don't remember too much " (Tr. 44), that " quite naturally " hysteria increased in magnitude from the time she was taken off the street and into the basement. Tr.44. She testified that during the assault itself she was beaten " to the extent that I was sort of semiconscious at certain times " (Tr.21), that she was hysterical but tried to keep her senses, but that she was in a state of semiconsciousness part of the time and then went limp and played dead. (Tr.50). She testified that when the men left the basement room she was still somewhat hysterical. (Tr.54). and that when she got out to the street she was hysterical, " crying and screaming " Tr. 24,55.

There followed a series of postponments of the trial date. On June 29, 1967, the trialdate was continued to July 24, 1967, at the appellant's request. On July 20, 1967, at the request of the Government the case was " decertified " from the Ready Calendar, and on November 2, 1967, it was again decertified, on the oral motion of the appellant. The case was again placed on the Ready Calendar on January 17, 1968. On April 18, 1968, the Government's motion for continuance of the trial date was denied. On the following day, April 19, 1968, on the Government's oralmotion, with the consent of the appellant, the case was set for trial on a date certain, May 14, 1968.

Accordingly, the delay from the date of appellant's arrest and the actual time that his trial did finally get under way had substantially prejudiced appellant.

THE APPELLANT'S INDICTMENT SHOULD HAVE BEEN DISMISSED

The offense with which appellant is charged was allegedly committed on December 19, 1966. Appellant was arrested that same night and has been in custody every since. An indictment was promptly returned. Appellant was brought to trial November 6, 1968, twenty-three months later. The Sixth Amendment to the Consfitution as here relevant provides: " In all criminal prosecution, the accused shall enjoy the right to a speedy trial." And Rule 48 (b) Fed. Rules Criminal Proc. provides: " If there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment." The speedy trial issue was raised by appellant by motion some six months prior to trial and again at trial. Tr.7. Yet on both occasion the appellant's motions were denied. At trial, counsel for appellant showed prejudice suffered by him as the result of the 23 months he was detained in custody awaiting trial. Entirely apart from the virrulent prejudice to appellant's person resulting from his extended pretrial incarceration (see Smith v. United States, U.S. App. D.C.___ F.2d __No. 22, 157, decided May 7, 1969; Smith v. United States, in a similar situation 1964. There was the serious prejudice to appellant's ability to defend against the charge (ibid) due to the disappearance

of named witnesses, including eyewitnesses to and participants in the offenses with which appellant was charged. Tr.9,10, 13. CF United States v. Ewell, 383 U.S. 116, 122 (1966). In the Smith case, supra, a 13 month pre-trial incarceration was held by this court to be " long enough to require us to give close scrunity to the issue" (slip, op., p.3). Such scrunity in Smith led the Court there to concluded that there was insufficient " showing of reasonable likelihood of prejudice to the defense. " Ibid. But the Court ennunciated this rule. It

> " decided not to rule that prejudice to the person by detention for a year automatically leads to dismissal. A delay of that duration does, however, - - shift to the prosecution a heavy burden of showing that there was no prejudice to the defense. " Slip . op., p5; emphasis supplied.

How much heavier the burden on the prosecution in the instant case, where the delay was for 23 months, not for a mere year; and where trial counsel set fourth in detail, immediately prior to the start of the trial, the names of the disappeared defense witnesses (Tr.9) something thattrial counsel in the Smith case had failed to do. Slip op., p-4 . It was not necessary, as this Court held in Smith (ibid), that trial counsel show " conclusiviely that the defense was prejudiced ", but we submit that he made " at least - - a showing of a reasonable likelihood of such prejudice, a showing not negatived by rebuttal of the prosecution. " The prosecution, however, did not discharge in the least its "burden" of showing that there was no showing of prejudice to the defense."

Under Local Rule 87, it is the duty of th e United States Attorney to place a case on the Ready Calendar. Indeed, as this Court said in McNeill v. United States, No. 21,570, decided June 4, 1968, slip op., p-2 " the burden is on the Government, not the defence

to bring a case totrial." Even were this not the rule, however, relatively little of the 23 months appellant spent waiting for trial is attributable to him. Continuances totally approximately four months were granted on appellant's motion. One month's continuance sought by the Government was granted with appellant's consent.

Approximately two month's loss of time resulted from the abortive change of plea proceedings. No part of the remaining 16 months can be attributed to appellant. In view of the Government's burden ' to bring a case to trial ', this 16 months' delay must be attributed to the Government. To the same effect was the Bell case as decided by this court in 1964.

In the McNeill case, supra, this Court found a speedy trial violation requiring dismissal of the indictment, even though only six months of the two and a half years between arrest and trial was " Unequivocally attributable to the Government ." See Smith case, supra, op., p.-3 Again, contrast the instant case where at least 16 of the 23 months between arrest and trial is attributable to the Government.

We recognize that dismissal of the indictment for denial of a speedy trial is a " drastic " remedy that ought not "be invoked lightly or thoughtlessly. " See separate opinion of Judge Wright in the Smith case, supra, slip op., p. 11. But in the present case, where the conviction of appellant depends so substantially upon the identification of appellant by a single eyewitness, the complainant where that identification is of questionable value (see Point III, infra), and where the witnesses lost to appellant by reason of the

Government's long delay in bringing him to trial included other eye-witnesses to the offense with which appellant was charged , dismissal of the indictment is plainly called for.

III. The Identification of Appellant Failed To Meet The Standards. Established By The Supreme Court and By This Court.

The Court's attention is respectfully directed to the following pages of the trial transcript: 20-22, 24-26, 37-38, 42-44, 47-48, 50-52, 54-57, 70-72, 74-79, 81-84, 93, 108-110, 113, 117-118, 124-126, 128-129, 131-133; and to the following pages of the transcript of the preliminary hearing: 6-11, 15-19, 21-22.

There were three identifications of appellant, all by the complainant: (1) the patrol wagon identification on the night of the crime; (2) the identification at the preliminary hearing

the following afternoon; (3) the in-court identification at trial two years later.

1. The Patrol Wagon Identification

The "totality of surrounding circumstances" (see Simmons v. United States, 390 U.S. 377, 383; Stovall v. Denno, 388 U.S. 293, 302), in the light of which the patrol wagon identification of appellant must be evaluated in order to determine whether it "was so unduly prejudicial as fatally to taint his conviction," are set forth above. It cannot be seriously questioned that this first identification of appellant by complainant, the identification upon which her subsequent identifications necessarily rest, took place in circumstances of a highly suggestive nature and was most unreliable.

In Clemons v. United States, 131 U.S. App. D.C._____, 408 F. 2d 1230 (1968), cert. denied, 394 U.S. 964 this Court quoted approvingly (408 F. 2d at 1245, n. 16) ten criteria enumerated by the District Court in the Clark case as relevant in making such an evaluation. See United States v. Clark, 294 F. Supp. 44, 49-50 (D.D.C. 1968). Complainant's patrol

wagon identification of appellant plainly failed six of these ten tests, the other four not being particularly pertinent.

> Test 1. "Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?"3/

Appellant was the only one in the patrol wagon, and therefore "the only individual that could possibly be identified as the guilty party" when officer Elsts asked complainant to see if she could identify him.

> Test 2. "Where did the confrontation take place?"

In the patrol wagon. A locale more highly suggestive of appellant's guilt is difficult to imagine. Appellant's presence in the locked part of the patrol wagon, tied with Officer Elsts' asking the complainant to see whether she could identify him, must clearly have communicated to complainant that the police believed that appellant was, at the very least, implicated in the rape.

3/ This test and the others quoted infra are all quoted in Clemons, supra, 408 F. 2d at 1245, n. 16.

The evidence is, of course, clear that Elsts arrested appellant and locked him in the patrol wagon before Elsts even knew that a rape had taken place. Tr. 76-78, 82. Apparently all he arrested appellant for was "running out of the alleyway *** and seemed like he was pulling up his trousers" (Tr. 76), although it is conceivable that he suspected appellant of glass breaking. In any event there is nothing at all to indicate that complainant was informed, when asked to see whether she could identify appellant, that appellant's presence in the back of the patrol wagon was purely coincidental.

> Test 3. "Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?"

No. The patrol wagon identification took place late at night. There was no reason whatsoever why the identification could not have been postponed until morning, when a lineup could have been held. This is not the Stovall case, supra, where there was fear that the complaining witness might die before a lineup could be held. See 388 U.S. at 295, 302. In this case, the complainant had been badly beaten, but she was ambulatory, had been discharged from the hospital the very night of the crime

(Prelim. Hear. Tr. 7), and was present in court the next morning for the preliminary hearing. Id. 6. In fact, the preliminary hearing was not held until the following afternoon (id. 8-9), so there was more than adequate time in which a line-up could have been held, and no problem about the complainant's ability to attend.

> Test 8. "Was the emotional state of the witness such as to preclude objective identification?"

Yes. The evidence is uncontradicted that complainant was in a highly excited, emotional, hysterical state. Tr. 24, 54-55, 72, 93. While this emotional state of complainant is easily understandable, it did not enhance her reliability or objectivity as a witness, and made her more than normally amenable to the suggestion of appellant's guilt implicit in his presence in the patrol wagon.

> Test 9. "Were any statements made to the witness prior to the identification indicating to him that the police were sure of the suspect's guilt?"

No statements were made indicating that the police were "sure" of appellant's guilt, but all the circumstances certainly suggested to complainant that the police at the least regarded appellant as a prime suspect. Why else was he in the patrol

wagon?----Complainant did not know that appellant had been picked up for some other vaguely defined or nonexistent crime. The complainant's observation of the offender was extremely limited, and therefore she was particularly amenable to suggestion. Complainant was accosted on a dark street on a dark night. The alley through which she was taken was unlighted, and the basement in which she was raped was dark, so dark, in fact, that she had difficulty finding her way out. Tr. 37-38, 42, 47, 54. Her ability to recognize her assailants was limited to the "maybe a half minute" or "few seconds" in which a light bulb was momentarily turned on (Tr. 22, 43, 47-48, 50-52), hardly enough time for her eyes to become accustomed to the light. She testified not only to her hysterical condition (Tr. 44, 54), but also that she was in great fear, for her very life (Tr. 43), so frightened that "Idon't remember too much". Tr. 44. She testified also that part of the time she

was semiconscious. Tr. 21. At the preliminary hearing she testified that "In the dark I couldn't see very well" (Prelim. Hear Tr. 19) and was unable to recognize that appellant was wearing different clothes than he had worn the previous night. Prelim. Hear. Tr. 16-19. It appears that at no time did she give the police any description at all of her assailants. Cf. the Clark case, supra, in Clemons, supra, 408 F. 2d at 1243; Stewart v. United States, ___U.S. App. D.C.___, _____F. 2d ____, No. 20, 983, February 10, 1959, slip op., pp. 2-3; Macklin v. United States, ____U.S. App. D.C. ____, 409 F. 2d 174, 175 (1969); Cunningham v. United States, ____U.S. App. D.C.____, 409 F.2d 168, 169 (1969); Frazier v. United States, ____U.S. App. D.C.____, ____F. 2d ____, No. 21, 426, March 14, 1969, slip op., p. 4.

In the circumstances described, the high degree of suggestion to complainant inherent in the patrol wagon confrontation was unavoidable. As stated in United States v. Wade, 388 U.S. 218, 229, "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the

greatest." Even lineups, a fortiori single suspect confrontations, in rape cases "present a particular hazard" because of the "victim's understandable outrage." Wade, supra, 388 U.S. at 230.

The merits of the principle of prompt or "fresh identification" (see Wise v. United States, 127 U.S. App. D.C. 276, 383 F. 2d 206, 209-10 (1967), cert. denied, 390 U.S. 964) need not be denied to hold that complainant's patrol wagon identification of appellant, although prompt, was so basically unfair that it could not "tolerably be admitted into evidence." 383 F. 2d at 210. This case is a far cry from Wise. There, one complainant encountered the intruder in his house, chased him, caught up with him, and was talking to him when the police arrived, never having lost sight of him during the chase. The intruder was immediately returned to the housebreaking scene, where the other complainant identified him by the sound of his voice. In the instant case there was totally lacking the continuity of action or of contact between complainant and appellant that gave fairness and reliability to the prompt identification in Wise.

The "totality of the circumstances surrounding" the identification here also differ markedly from those in Stewart,

supra, where there was also a prompt identification. There, the complainant had had ample opportunity to observe the accused, gave the police a good description of him, and identified him about two hours after the crime and only minutes after seeing him carrying the loot. Again, in Solomon v. United States, ____U.S. App. D.C. ____, 408 F. 2d 1306 (1969), as in Wise, the continuity of action and of the contact between the witness and the accused was unbroken, the Court noting "the fact that (the accused) was constantly in view of either (the witness) or the arresting officer between the commission of the crime and the apprehension (and identification), and the finding of the stolen goods on the path of his flight." 408 F. 2d at 1309.

As this Court held in McRae v. United States, ____U.S. App. D.C.____, ____F. 2d____, No. 21, 980, June 10, 1969, slip op., p. 14:

> "At some point the nexus of time and place between offense and identification must become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses. We conclude that this point was reached, and more, in this case."

In McRae, indeed, the victim had had good opportunity to observe

her attacker and had given a description of him to the police before identifying the accused, which information was sufficient to enable the victim's son to lead the police to the accused.

A fortiori, in this case, where complainant had minimal opportunity to observe her attackers and gave no description at all to the police and where appellant was arrested by an officer who had not even heard that the crime had been committed, there was no nexus whatsoever between offense and identification to outweigh the recognized dangers of presenting suspects singly to witnesses. The totality of the circumstances surrounding the patrol wagon identification were plainly such as to deny appellant due process of law, and the evidence of that identification should not have been admitted.

CERTIFICATE OF SERVICE

I, Clifford H. Middleton, the appellant do certify that I have mailed the United States District Attorney a copy of the foregoing motion by depositing a copy into the United States mail this 21 st day of January, 1970 by depositing a copy into the U.S. Mail addressed him at the U.S. District Courthouse, Washington, D.C.

Clifford H. Middleton

CLIFFORD H. MIDDLETON
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